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Subject: Inclusion of Interest in Liquidated Damage Estimates

Applicability: Guidance

1. References:

- a. Construction Bulletin 90-25, CEMP-C, 25 October 1990
- b. FAR Subpart 11.5-Liquidated Damages
- c. DFAR Subpart 211.5

2. The purpose of this bulletin is to provide guidance on the inclusion of interest on liquidated damage estimates for construction contracts.

3. The policies and procedures for using liquidated damage clauses are clearly established in the referenced FAR and DFAR'S sections noted above. However, inclusion of interest within these estimates is not specifically addressed in these references. The last available guidance on this subject was CB 90-25, which, when summarized, stated "interest during construction should be considered along with other reasonable damages and included in the rate if appropriate".

4. **There has been only one published decision by a Federal Court or Board of Contract Appeals, which has addressed the issue. That case was *George F. Marshall and Gordon L. Blackwell*, ENG BCA No. 6066, 00-1 BCA ¶ 30,730. In its decision, the Board did not prohibit the inclusion of interest as a factor in calculating liquidated damages, but it did seriously question the practice. In a footnote, the Board stated:**

..."the inclusion of "interest" in the liquidated damages rate is unique in our experience. We know of no other Government procurement regulation or case providing for an "interest" component in a construction contract rate. The FAR, DFARS, AFARS and EFARS do not address, much less endorse or reasonably contemplate, inclusion of an "interest" component"...

5. The FAR does not provide for the inclusion of interest as a factor in calculating liquidated damages. While the inclusion of interest is not specifically precluded by regulation or case law, it is highly unlikely that a court or board would uphold a liquidated damages clause that included interest as a component. Accordingly, interest costs should not be included in liquidated damage estimates.

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6. This issue has been coordinated with both the Office of Counsel and the Principal Assistant Responsible for Contracting (PARC). HQUSACE point of contact for this issue is Brad James, CECW-ET-C, 202-761-5541.

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